No. 76-8

In the Supreme Court of the United States

OCTOBER TERM, 1976

A. V. BAMFORD, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 535 F. 2d 78. The order of the Federal Communications Commission is unreported. The memorandum opinion and order of the Commission's Review Board (Pet. App. C) is reported at 48 FCC 2d 1155. The initial decision of the administrative law judge (Pet. App. B) is reported at 48 FCC 2d 1161.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1976, and a timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6, 1976 (Pet. App. D). The petition for a writ of

certiorari was filed on July 7, 1976. The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner received fair notice of the community groups he was required to consult in order to make a sufficient ascertainment of the community's programming needs to obtain a broadcast construction permit from the Federal Communications Commission.

2. Whether the Commission erred in refusing to allow petitioner to reopen the record for a third time to supplement his survey of the community's needs.

STATEMENT

The Federal Communications Commission (the "Commission") requires an applicant for new broadcasting authority to familiarize itself with the needs, interests and problems of the groups comprising the community proposed to be served by the new facility; to document its familiarity with those concerns in the license application; and to submit programming proposals designed to meet those needs. As set forth in its Report and Order entitled *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (the "Primer"), the Commission requires each applicant to consult (1) a randomly selected sample of members of the general public (*id.* at 660, 666-667, 682); and (2) leaders of each "significant group" comprising the community (*id.* at 660, 666, 668, 682-684). In recognition of the heterogeneous nature of the nation's communities, the Commission did not promulgate an exhaustive list of organizations that are considered "significant" for purposes of ascertaining

the relevant leaders to be consulted.[1] Rather, it required that each applicant make a demographic and economic study of the community to be served to determine its distinctive features and then select for consultation community leaders of formal and informal groups that reflect its particular composition (*id.* at 663, 666, 683-684). The Commission cautioned, however, that "[t]he omission of consultations with leaders of *a* significant group would make the applicant's showing defective, since those consulted would not reflect the composition of the community" (*id.* at 684, emphasis supplied; see *id.* at 666).

In January 1970, petitioner applied to the Commission for a construction permit for a new FM radio station in Corpus Christi, Texas.[2] In May 1971, petitioner conducted a series of personal interviews with 45 residents of that city. He designated 22 of these persons as community leaders, and the remaining 23 people were considered to be "de facto" members of

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[1]The Primer provides that "[t]he 'significance' of a group may rest on several criteria, including its size, its influence, or its lack of influence in the community." 27 FCC 2d at 683.

[2]Petitioner submitted his application shortly after the Commission issued a notice of inquiry on the ascertainment standards and published a proposed Primer (20 FCC 2d 880). At petitioner's request, a hearing on his application was delayed pending publication of the Primer. After its publication, applicants with pending proceedings were allowed to amend their community ascertainment showings as a matter of right to comport with the Primer's standards (27 FCC 2d 680). Pet. App. 4a-5a.

the general public (Pet. App. 5a & n. 6, 24a).[3] After an initial hearing on the ascertainment issue raised questions about petitioner's failure to consult leaders of significant groups, he interviewed an additional 22 community leaders (Pet. App. 5a, 28a-30a). He also submitted to the Commission a study of the composition of the community consisting of one page from the 1970 Census, providing information on race, age and head of household status for the population, and a list of the community's service, professional and trade organizations, as well as a general description of its industrial activity and work force (Pet. App. 7a-8a). His compositional study contained no information on income distribution, which would have shown that 18.4 percent of the population was below the poverty level (Pet. App. 8a, 46a).

The Commission's record on petitioner's license application was closed on January 20, 1972. On September 18, 1973, the Commission's Administrative Law Judge set November 19, 1973, as the date for filing proposed findings of fact. One week before that deadline, petitioner requested a postponement of the filing date and a reopening of the record to allow submission of a new community needs ascertainment study designed to cure "potentially disqualifying" inadequacies in his original submission (Pet. App. 17a-18a, 40a, n. 6). The Administrative Law Judge denied that motion on the ground that petitioner had failed to show good cause for the reopening, as required by Section 1.552(b) of the Commission's rules, 47 C.F.R. 1.522(b) (Pet. App. 17a).

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[3]Petitioner also mailed questionnaires to 500 members of the general public. However, the Primer expressly provides that applicants cannot rely on information gathered by the recipients' voluntary return of such questionnaires by mail because of the strong "cooperation bias" this survey technique produces (27 FCC 2d at 668, 684; Pet. App. 48a).

Although characterizing petitioner's showing as "fragmented," "haphazard in the extreme," and designed to achieve "an absolute minimum of adherence" to the ascertainment requirements (Pet. App. 32a, 36a), the Administrative Law Judge nonetheless found that petitioner had complied with the Primer (*id.* at 36a-37a). The Commission's Review Board reversed his initial decision and denied petitioner's application. It held that both petitioner's general public and community leader surveys were deficient. It found that his failure to conduct adequate community leader consultations was due to the insufficiency of his efforts to determine the demographic composition of the community and thus identify the relevant categories of leaders to be targeted. The Board specifically noted that although 18.4 percent of the families in the area were below the poverty level, petitioner had not contacted representatives of any community welfare organizations (Pet. App. 46a). Moreover, the Board held that petitioner's method of designating 23 of his original interviewees as members of the general public by default did not constitute a random survey of the general public, as the Primer requires. It found that as a consequence of this defect, petitioner's public survey did not "even roughly reflect the community's composition," for only 13 percent of those interviewed were women, and no blue-collar workers, students, housewives, farmers, teachers, persons under 21 years of age, or members of the large Spanish-surnamed minority population were consulted in that study (Pet. App. 47a-48a). The Commission denied review on the basis of the Review Board's opinion (Pet. App. 2a, n. 1).

The court of appeals, with one judge dissenting, affirmed the Commission's decision (Pet. App. A). It concluded that petitioner's failure to interview any community

leader representing the interests of the substantial number of impoverished persons in the Corpus Christi area necessarily rendered his ascertainment study defective and justified the denial of his application (Pet. App. 11a, 16a).[4] It also found that the Primer, the Report accompanying the Primer, and prior Commission precedent had provided petitioner adequate notice that he was required to consult with the leaders of the poor (Pet. App. 13a-16). Finally, it held that the Administrative Law Judge had not erred in rejecting petitioner's request to reopen the record for submission of new material designed "merely * * * to overcome the blatant deficiencies of the previous ascertainment efforts" (Pet. App. 18a).[5]

ARGUMENT

This case involves merely the application of the Commission's recently promulgated regulations in the particular factual context of a single license application and therefore presents no issue of general significance warranting review. In any event, the decision of the court of appeals was correct.

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[4]The Commission had also concluded that petitioner's ascertainment survey was defective for failure to show consultation with leaders of the Spanish-speaking community (Pet. App. 45a-46a). However, the court of appeals held that petitioner's survey efforts had been adequate in this respect (Pet. App. 9a-11a). Therefore, contrary to petitioner's assertion (Pet. 6, 14), that issue is not before this Court.

[5]The court of appeals also affirmed the Commission's finding that petitioner's general public survey was not conducted in compliance with the Primer because the persons selected for interviewing had not been randomly selected (Pet. App. 6a-7a, n. 7). Although this finding, as affirmed, constituted an independent basis for the rejection of petitioner's application, the court of appeals did not rely upon this ground in affirming the Commission's decision.

1. Petitioner contends (Pet. 10-12, 13-14) that the ascertainment standards set forth in the Primer are so vague that they did not provide adequate notice that he was required to consult representatives of the impoverished in order to obtain a construction license. Contrary to his representation (Pet. 6, 14-15), however, the Primer did not establish an exhaustive list of categories of community leaders applicants were required to interview (Pet. App. 11a-12a, n. 12). The Commission's Report accompanying the Primer explicitly stated that submission of a separate compositional study of the community was required because "no community can be described as 'average' " and thus no single listing of community groups could be representative of every locality in the country (27 FCC 2d at 662). The Report further specified that an applicant would be required to communicate with leaders of "welfare associations" if they comprised a significant segment of the community to be served, and that its programming then might include treatment of the problems of the impoverished (*id.* at 657, 663, 671, 672-673).[6] Moreover, as the court of appeals noted (Pet. App. 13a-16a), prior Commission decisions clearly indicated the poor must be consulted if they constitute a significant population element. See, *e.g.*, *City of Camden*, 18 FCC 2d 412.

Petitioner also suggests that the Commission's denial of 16 license applications for failure to conduct adequate community needs surveys demonstrates that the Primer's standards are unclear. However, since hundreds of other applicants have satisfied those requirements during this period, the explanation for petitioner's failure

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[6]As the court of appeals correctly held (Pet. App. 13a, n. 13), the Report and Order of the Commission were an integral part of the Primer.

of compliance must lie in the "haphazard ascertainment showing" and insufficient demographic study he presented (Pet. App. 7a) and not in the flexibility the regulations provide to accommodate the diversity of the nation's communities.

Petitioner also contends (Pet. 8-10) that the decision of the Commission's Review Board to issue a construction license is an unrelated proceeding, *In re Application of A. C. Elliott, Jr.*, Docket No. 20196, demonstrates that the Commission has applied its ascertainment standards in an inconsistent manner. However, the administrative proceedings in the *Elliott* case are not yet final; the Commission is currently considering an appeal by its Broadcast Bureau from the Review Board's decision. In any event, the resolution of a conflict, if any, in the Review Board's application of these standards to the discrete factual situations presented by various license applications is properly a matter for the Commission and not this Court.[7]

2. Moreover, even though the court of appeals did not rely on this rationale, petitioner's failure to comply with the Primer's general public survey requirements provides an independent basis for upholding the decision below. The court of appeals specifically affirmed the Commission's finding that petitioner's interviews with 23 persons not selected at random were inadequate (Pet. App. 6a-7a, n. 7). Since a proper random survey is one of the coordinate bases upon which the applicant's

[7]Similarly, petitioner's suggestion (Pet. 13) that a conflict may develop in the future among the decisions of the various panels of the court of appeals concerning factual application of the ascertainment standards provides no occasion for granting the petition. Even were a true intra-circuit conflict to develop, it should properly be resolved by the court of appeals sitting *en banc*.

evaluation of community needs depends (27 FCC 2d at 682), petitioner's failure to conduct an adequate survey in itself warranted denial of his application.[8]

3. Petitioner also contends (Pet. 14-15) that the court of appeals erred in holding that the Commission properly refused to reopen the record in November 1973 to allow submission of additional survey material. Section 1.522(b) of the Commission's regulations provides that an application may be amended after it has been designated for hearing "only for good cause shown".[9] Petitioner's proposed submission was designed merely to overcome the "potentially disqualifying" deficiencies in his prior ascertainment efforts, and not to update his old surveys to present a current assessment of the community's needs. Petitioner has shown no justification for the inadequacy of his earlier efforts and suggested no reason why any supplemental showings he wished considered could not have been submitted at a much earlier date. The court of appeals thoroughly considered whether petitioner had in fact shown good cause for this eleventh

[8]The Commission has determined that different standards are appropriate to judge the showing of community needs by applicants for renewal of broadcasting authority, who bear a continuous ascertainment obligation. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418; cf. 41 Fed. Reg. 19536. Thus, even if, as petitioner suggests (Pet. 13-14), the Commission has promulgated an exhaustive list, not including welfare organizations, of community groups to be consulted by renewal applicants, see 41 Fed. Reg. 19553, petitioner is not thereby entitled to relief for his failure to comply with the differing standards reasonably applied to applicants for initial authority.

[9]Section 1.522(b), 47 C.F.R. 1.522(b), provides, in pertinent part:

> Requests to amend an application after it has been designated for hearing will be considered only upon written petition * * * and will be granted only for good cause shown.

hour submission and concluded that he had not (Pet. App. 16a-19a). Further review of this factual issue is not warranted—especially in light of the fact that petitioner will be free to submit a new application for the construction permit after final disposition of this case.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[10]Under Section 1.519 of the Commission's regulations, 47 C.F.R. 1.519, the same applicant may reapply after 12 months has elapsed from the Commission's denial of his prior application (although the Commission will not consider the new application until final disposition of any appeal that has been taken from the prior application). There is, of course, the possibility that competing applications may be filed in connection with a renewed application by petitioner (see 47 C.F.R. 1.571(c)), even though no competing applications were involved in his filing at issue here.